

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

ROGERKALAOUZANDASSOCIATES,a)
 Lebanesecorporation;andRK&A,INC.,a)
 subsidiaryCaliforniacorporation,32610) No.1:11-CV-00652-HJW
 McRaeLane,Wildomar,California92595,)
) JudgeHermanJ.Weber
 Plaintiffs,)
)
 v.)
)
 JACKROUSEASSOCIATES,INC.,600)
 VineStreet,Suite1700,Cincinnati,Ohio)
 45202,)
 Defendant.)

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE,
FOR A MORE DEFINITE STATEMENT**

Plaintiffs Roger Kalaouz and Associates and RK&A, Inc. (“Plaintiffs”) respectfully submit the following memorandum in opposition to the motion by Defendant Jack Rouse Associates, Inc. (“Defendant”) to dismiss this case under Fed. R. Civ. P. 12(b)(6) or, in the alternative, for a more definite statement.

I. ARGUMENT

Pursuant to the parties' joint motion, Plaintiffs were granted until November 30, 2011 to file an amended complaint in response to Defendant's motion to dismiss. (Dkt. No. 20). On November 30, 2011, Plaintiffs filed and served an amended

complaint (the “First Amended Complaint”) as a matter of right, so Defendant’s motion to dismiss the original complaint should be denied as moot. Pursuant to Fed. R. Civ. P. 15(a)(1), each party has the right to amend its pleadings “as a matter of course” without leave of court at any time before a responsive pleading is served. Fed. R. Civ. P. 15(a)(1); *Miller v. ACI Indus.*, No. C2-09-CV-447, 2010 U.S. Dist. LEXIS 495, at *3 (S.D. Ohio Jan. 5, 2010) (“plaintiff is entitled to amend a complaint once as a matter of right before a responsive pleading is filed.”). Motions under Fed. R. Civ. P. 12 are not “responsive pleadings” for purposes of Rule 15. *Miller v. ACI Indus.*, 2010 U.S. Dist. LEXIS 495, at *3 (observing a motion to dismiss is not considered a responsive pleading under Rule 15(a)); *Herzog v. Secretary of Health, Educ. and Welfare*, 686 F.2d 1154, 1162 (6th Cir. 1982) (“A motion to dismiss is not a responsive pleading.”). Accordingly, the filing of Defendant’s motion to dismiss under Fed. R. Civ. P. 12(b)(6) or, in the alternative, for a more definite statement under Fed. R. Civ. P. 12(e), does not bar Plaintiff from amending its complaint as a matter of right.

Plaintiffs’ amended complaint supersedes its original complaint filed on September 21, 2010 and renders it of no legal effect (aside from the commencement date of this action, notice of the asserted contract breach, and any other timing issues). *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306-07 (6th Cir. 2000) (filing of a new complaint supersedes the previous complaint and controls the case).

Defendant's motion to dismiss the original complaint, or, in the alternative, for a more definite statement, should therefore be denied as moot. *See Dorcsey v. Clements*, 2011 U.S. Dist. LEXIS 131850, at *6 (S.D. Ohio Nov. 15, 2011) (filing of amended complaint rendered partial motion to dismiss based on the original complaint moot).

II. CONCLUSION

For these reasons, Defendant's motion to dismiss, or in the alternative, for a more definite statement, should be denied as moot.

Respectfully submitted this 30th day of November, 2011.

DINSMORE & SHOHL LLP

/s/ Gary E. Becker

Gary E. Becker (0012716)

Robert M. Zimmerman (0079584)

1900 Chemed Center

255 East Fifth Street

Cincinnati, Ohio 45202

Phone: (513) 977-8200

Fax: (513) 977-8141

Email: gary.becker@dinsmore.com

robert.zimmerman@dinsmore.com

Attorneys for Plaintiffs

Roger Kalaouz and Associates

and RK & A, Inc.

LEWIS BRISBOIS BISGAARD & SMITH LLP

Leron E. Rogers

Georgia Bar No. 482620

Kenneth A. Newby

Georgia Bar No. 179772

Attorneys for Plaintiffs
(pro hac vice admissions pending)

1180 Peachtree Street, NE
Suite 2900
Atlanta, Georgia 30309
Phone: (404) 348-8585
Fax: (404) 467-8845
Email: lr@lbbbslaw.com
kn@lbbbslaw.com

Of Counsel for Plaintiffs
Kendall A. Minter, Esq.
MINTER & ASSOCIATES, LLC
5398 E. Mountain Street
Stone Mountain, GA 30083

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CERTIFICATE OF SERVICE

We certify that on November 30, 2011, we electronically filed the foregoing

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TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE

STATEMENT using the CM/ECF system which will send notification of such filing

to counsel of record in this matter who are registered on the CM/ECF:

James R. Cummins, Esq.
Renee A. Infante
**WAITE, SCHNEIDER, BAYLESS &
CHESLEY CO., L.P.A.**
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202

jcummins@wsbclaw.com
reneeinfante@wsbclaw.com
(513)621-0267–Telephone
(513)381-2375–Facsimile

*Counsel for Defendant
Jack Rouse Associates, Inc.*

Respectfully submitted this 30th day of November, 2011.

DINSMORE & SHOHL LLP

/s/ Gary E. Becker

Gary E. Becker (0012716)
Robert M. Zimmerman (0079584)
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
Phone: (513) 977-8200
Fax: (513) 977-8141
Email: gary.becker@dinsmore.com
robert.zimmerman@dinsmore.com

*Attorneys for Plaintiffs
Roger Kalaouz and Associates
and RK & A, Inc.*